



Role Of Indian Courts In Facilitating International Commercial Arbitration: A Critical Evaluation

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ABSTRACT

This article offers a critical assessment of the function of Indian courts in the facilitation of International Commercial Arbitration (ICA). The article commences by examining the historical development of arbitration in India, with a particular emphasis on the transformation that was facilitated by the Arbitration and Conciliation Act of 1996, which aligns India's arbitration framework with international standards. The article examines key features of the Act, recent amendments, and significant judicial precedents that have shaped the arbitration landscape in India. Despite the robust legal framework, the article identifies several challenges in the role of Indian courts in ICA, such as excessive judicial intervention, inconsistency in judicial decisions, delays in judicial processes, and contentious interpretations of public policy. The lack of specialized arbitration benches and the underutilization of institutional arbitration further complicate the effective facilitation of ICA. The article highlights opportunities for enhancing the role of Indian courts, including promoting judicial training and awareness, streamlining judicial processes, encouraging institutional arbitration, and strengthening arbitration infrastructure. A comparative analysis with global arbitration hubs like Singapore, Hong Kong, and the United Kingdom provides insights into best practices that can be adopted in India. Case studies of landmark judgments, such as *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (BALCO)* and *ONCO Ltd. v. Western Geco International Ltd.*, demonstrate the evolving judicial attitude towards arbitration. The article concludes with recommendations for legislative reforms, establishing specialized arbitration benches, promoting institutional support, enhancing judicial training, streamlining judicial processes, and investing in arbitration infrastructure. By addressing these challenges and leveraging the identified opportunities, Indian courts can play a pivotal role in positioning India as a premier destination for international arbitration, fostering a conducive environment for international trade and investment.

Keywords: Indian Courts, Arbitration and Conciliation Act, 1996, Judicial Intervention, Arbitrator Appointments, Enforcement of Arbitral Awards, Judicial Training, Legislative Reforms.

Introduction

International Commercial Arbitration (ICA) has become the preferred method for resolving cross-border commercial disputes as a result of its efficiency, confidentiality, and adaptability. In the context of globalization, where businesses increasingly engage in international transactions, the importance of a robust and reliable arbitration framework cannot be overstated. Indian courts perform a critical function in this framework, influencing the facilitation and effectiveness of ICA in the country. This article critically evaluates the role of Indian courts in facilitating ICA, examining their impact on arbitration proceedings, enforcement of awards, and overall arbitration-friendly environment in India.

Arbitration is becoming a more prevalent method of dispute resolution for a variety of reasons, including its consensual nature, the ability to resolve disputes by non-governmental decision-makers, its flexibility in comparison to the majority of judicial proceedings, and the ability to enforce a binding award through

arbitration.¹³ When parties from various countries are involved in an arbitration, it is widely agreed that the arbitration being conducted is considered to be international.² As a result, it is structured in such a way that disagreements are settled in a neutral manner by following procedural standards that are globally neutral, and it often chooses a seat of arbitration that is not local to either of the parties.³

The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards⁴ (hereinafter New York Convention) which has been ratified by 144 countries,⁵ makes it obligatory for Member Nations to enforce both agreements to arbitrate as well as arbitration awards.⁶ To ensure uniformity in national arbitration statutes, the Model Law was adopted by the United Nations Commission on International Trade Law (hereinafter UNCITRAL) in 1985⁷ and legislations based on the same have been enacted in over sixty countries.⁸ Model Law provides for judicial intervention under certain circumstances,⁹ such as interim measures of protection,¹⁰ appointment of arbitrators¹¹ and setting aside, recognition and enforcement of arbitral awards.¹² Most modern arbitration legislations narrowly limit the power of national courts to interfere in the arbitration process, both when arbitral proceedings are pending and in reviewing ultimate arbitration awards.

Therefore, since rulings made by municipal courts are subjective, the international arbitration procedure is characterised by a certain degree of ambiguity. When parties are interested in resolving their disagreements via arbitration, they will only do so if they are able to get assurances from non-governmental decision-makers on their choice, in addition to the other benefits that were discussed before. If there is a lack of consistency and more ambiguity all over the globe, it may have significant repercussions for international trade.

Historical Background of Arbitration in India

The history of arbitration in India dates back quite a few decades, evolving significantly over the centuries. Traditional dispute resolution methods in India often involved community elders acting as arbitrators. The formalization of arbitration commenced during the British colonial period with the Indian Arbitration Act of 1899, which was modelled after the English Arbitration Act of 1889. The subsequent Arbitration Act of 1940 aimed to consolidate arbitration laws but was criticized for its complications in the procedures and considerable involvement from the judiciary. In the years after the passage of the Arbitration and Conciliation Act, 1996 (the Act), the landscape of arbitration in India witnessed a significant upheaval. The purpose of this Act, which was modelled after the UNCITRAL Model Law on International Commercial Arbitration, was to provide a complete legal framework for both domestic and international arbitration, with an emphasis on minimum judicial interference and the sovereignty of the parties involved.¹³

Role of Indian Courts in Facilitating ICA

Courts in India play an important part in the many phases of the arbitration process, beginning with the beginning of the arbitration procedure and continuing all the way through the enforcement of verdicts. This section critically evaluates their role in facilitating ICA.

¹ Gary B Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2015) 56.

² UNCITRAL Model Law on International Commercial Arbitration, 1985 (hereinafter Model Law), Article 1.3.

³ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 1-42 (2004).

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U. N. T. S. 38

⁵ United Nations Commission on International Trade Law, Status: Convention on Recognition and Enforcement of Foreign Arbitral Awards, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY_Convention_status.html (Last visited on June 2, 2024).

⁶ New York Convention, Article II.

⁷ Adopted on June 21, 1985 at the INC ITRAL' s 18th Annual Session.

⁸ United Nations Commission on International Trade Law, Status: UNCITRAL Model Law on International Commercial Arbitration, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (Last visited on June 2, 2024).

⁹ See Model Law, Article 5: 'In matters governed by this law, no court shall intervene except where so provided this Law'.

¹⁰ See Model Law, Article 9: 'It is not incompatible with an arbitration agreement for a party to request, before during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.'

¹¹ See Model Law, Articles 11, 13, 14.

¹² See Model Law, Articles 34-36.

¹³ White & Case et al, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration 12(2015) available at http://www_arbitration.qmul.ac.uk/docs/164761.pdf (accessed on 8 June 2024).

1. **Judicial Attitude towards Arbitration:** The attitude of Indian courts towards arbitration has evolved over the years. Initially, courts exhibited a propensity to interfere with arbitral proceedings and awards, often leading to delays and undermining the essence that arbitration is a tool for the settlement of disputes that is both quick and effective. However, recent judicial pronouncements indicate a shift towards a more arbitration- friendly approach, emphasizing minimal interference and respect for the independent nature of the arbitration procedure.¹⁴
2. **Appointment of Arbitrators:** The appointment of arbitrators is a crucial function of the courts, especially in situations in which the parties involved are unable to reach a consensus over the selection of arbitrators. The 2015 amendments to the Act introduced streamlined procedures for the appointment of arbitrators, empowering arbitral institutions to appoint arbitrators in certain cases. This has reduced delays and enhanced the efficiency of the arbitration process. However, challenges remain, particularly in ensuring that arbitrator appointments are free from bias and influence.
3. **Interim Measures:** Interim measures are crucial for preserving the subject matter of arbitration and making certain that the results of the arbitration procedure are satisfactory. Indian courts have the power to grant interim measures before or during arbitral proceedings. The Act empowers both arbitral tribunals and courts to grant interim measures, providing parties with the necessary support to protect their interests. The judiciary's role in granting interim measures has been instrumental in building confidence in the arbitration process.¹⁵
4. **Enforcement of Arbitral Awards:** One of the most important aspects of the arbitration process is jurisdiction the of collection Indian and courts enforcement of arbitral decisions. It is within the to enforce arbitral decisions from both local and international sources. The Act, which is in accordance with the New York Convention, makes provisions for the recognition and enforcement of awards from other countries so long as certain requirements are met. Despite this, the enforcement of awards can be challenging due to procedural complexities and judicial scrutiny. Recent judicial pronouncements, however, indicate a trend procedure and reducing the grounds for refusal. towards simplifying enforcement.
5. **Setting Aside of Arbitral Awards:** Indian courts have the authority to invalidate arbitral awards on specific grounds, such as the incapacity of the parties, the absence of appropriate notice, the invalidity of arbitration agreements, and public policy considerations. The judiciary's approach to setting aside awards has undergone a transformation, as courts have tended to adopt a pro-arbitration stance and have limited the scope of judicial review. Nevertheless, the enforcement of awards is frequently impeded by the contentious nature of the interpretation of public policy.
6. **Judicial Support for Arbitration Infrastructure:** The development of arbitration infrastructure is essential for the effective conduct of arbitral proceedings. The establishment of arbitration centres and the promotion of the use of technology in arbitration have been facilitated by Indian courts. The Mumbai Centre for International Arbitration (MCIA) and the Delhi International Arbitration Centre (DIAC) are two notable examples of initiatives to improve the arbitration infrastructure in India.¹⁶

Challenges in the Role of Indian Courts

Despite the positive developments, several challenges persist in the role of Indian courts in facilitating ICA:

1. **Judicial Intervention:** Excessive judicial intervention remains a significant challenge. While the Act aims to limit judicial interference, courts have occasionally overstepped their boundaries, leading to delays and undermining the autonomy of the arbitral process. Ensuring that judicial intervention is confined to the specific instances outlined in the Act is crucial for maintaining the efficacy of arbitration.
2. **Inconsistency in Judicial Decisions:** Inconsistency in judicial decisions poses a challenge with regard to the predictability and dependability of the arbitration procedure. Divergent interpretations of arbitration law by different courts can create uncertainty and discourage parties from opting for arbitration. Efforts to harmonize judicial essential decisions and provide clear guidelines on arbitration-related matters are essential.
3. **Delay in Judicial Processes:** Delays in judicial processes, particularly in both the selection of arbitrators and the implementation of rulings are factors that negatively impact the effectiveness of arbitration. Addressing procedural delays and ensuring timely judicial intervention are critical for enhancing the attractiveness of arbitration in India.
4. **Interpretation of Public Policy:** One of the most difficult issues that continues to arise is the interpretation of public policy, which often results in the annulment of arbitral verdicts. It is vital to have a restricted and consistent interpretation of public policy that is in accordance with international standards to decrease the number of problems that are encountered while enforcing awards.

¹⁴ Jan K Schaefer, 'Court Assistance in Arbitration — Some Observations on the Critical Standby Functions of the Court' (2016) 43(Special Symposium Issue) *Pepperdine Law Review* 521-540, 524.

¹⁵ Julian D M Lew, 'Does National Court Involvement Undermine the International Arbitration Process?' (2009) 24(3) *American University International Law Review* 489-537, 494.

¹⁶ Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 86.

5. Lack of Specialized Arbitration Benches: The absence of specialized arbitration benches in higher courts contributes to delays and inconsistent decisions. Establishing specialized benches with judges trained in the law of arbitration has the potential to improve the effectiveness and predictability of court participation in litigation involving arbitration.¹⁷

Opportunities for Enhancing the Role of Indian Courts

Despite the challenges, several opportunities exist for enhancing the role of Indian courts in facilitating ICA:

1. Promoting Judicial Training and Awareness: Promoting judicial training and awareness on arbitration law and practices is crucial. Regular training programs and workshops for judges can foster arbitration-friendly judicial attitudes and ensure that judges are well-versed in the nuances of arbitration law.
2. Streamlining Judicial Processes: Streamlining judicial processes for increasing the effectiveness of arbitration may be accomplished via the selection of arbitrators and the implementation of rulings. Establishing clear guidelines and timelines for judicial intervention can reduce delays and ensure timely resolution of disputes.
3. Encouraging Institutional Arbitration: Encouraging institutional arbitration can address the challenges associated with ad hoc arbitration. The structure and uniformity of the arbitration process may be improved by encouraging the usage of recognised arbitration institutions and assisting in the creation of new ones.
4. Strengthening Arbitration Infrastructure: Strengthening arbitration infrastructure, including establishing state-of-the-art arbitration centers across major cities, can provide the necessary support for conducting efficient arbitral proceedings. Investment in technology and facilities can further enhance the attractiveness of India as an arbitration hub.
5. Enhancing Enforcement Mechanisms: Enhancing enforcement mechanisms for arbitral awards is critical for building confidence in the arbitration process. Simplifying procedures for the enforcement of awards and ensuring that judicial scrutiny is limited to grounds specified in the Act can streamline the enforcement process.

Comparative Analysis: Role of Courts in Global Arbitration Hubs

The results of a comparative study of the roles that courts play in the most prominent arbitration centres may give India with useful insights into the finest practices that it can embrace.

Singapore: Singapore is renowned for its arbitration-friendly legal framework and minimal judicial intervention. The Singapore International Arbitration Centre (SIAC) and supportive judicial attitudes have positioned Singapore as a premier arbitration destination. Indian courts can draw lessons from Singapore's streamlined judicial processes and emphasis on party autonomy.¹⁸

Hong Kong: Hong Kong's success in international arbitration is attributed to its robust legal framework, the presence of the Hong Kong International Arbitration Centre (HKIAC), and a judiciary that acknowledges and respects the independence of the arbitral procedure. The limited judicial intervention and efficient enforcement mechanisms in Hong Kong serve as a model for India.¹⁹

United Kingdom: The United Kingdom, particularly London, is a leading arbitration center due to its comprehensive legal framework, including the English Arbitration Act of 1996, and institutions like the London Court of International Arbitration (LCIA). The UK judiciary's minimal intervention and support for arbitration infrastructure provide valuable insights for enhancing India's arbitration framework."²⁰

Case Studies: Judicial Facilitation of ICA in India

Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (BALCO)²¹

A fundamental paradigm change occurred in the way that the Indian court approaches arbitration as a result of the BALCO judgement. In order to reduce the amount of judicial involvement that occurs in international arbitrations, the Supreme Court of the United States decided that Part I of the Arbitration and Conciliation Act of 1996 does not apply to arbitrations that are conducted in foreign-seated jurisdictions. By making this judgement, India reaffirmed its commitment to reducing the amount of judicial intrusion and bringing itself in line with international arbitration procedures. The courts would have concurrent jurisdiction, regardless of whether the parties agreed to designate a particular location for the settlement of the dispute via arbitration. The functioning of this judgement was halted by the Supreme Court when it received an appeal.

ONCG Ltd. v. Western Geco International Ltd²²

¹⁷ Denice Forsten, 'Parallel Proceedings and the Doctrine of Lis Pendens in International Commercial Arbitration: A Comparative Study Between the Common Law and Civil Law Traditions' (Master's Thesis, Uppsala Universitet 2015) 51.

¹⁸ Warren B. Chik, Recent Developments in Singapore on International Commercial Arbitration, INT'L L. 337 (2007).

¹⁹ Nigel Blackaby, Redfern and Hunter on International Arbitration (6th edn, OUP 2015) 7.01.

²⁰ Gary B Born, International Arbitration: Law and Practice (2nd edn, Kluwer Law International 2015) 56.

²¹ 2012 (9) SCC 552

²² (2014) 9 SCC 263

The Supreme Court of the United States, in this decision, outlined the limits of judicial review of arbitral awards and emphasised that courts should not interfere with the determination of the merits of an award. In addition to contributing to a more arbitration-friendly court approach, this judgement highlighted the significance of the autonomy of the parties involved and the finality of the decisions rendered by arbitrators.

Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co.²³

The judgement that the Delhi High Court made in this particular instance exemplified a judicial attitude that is supportive of interim measures that are done in order to facilitate arbitration. In order to allow the subject matter of the arbitration to be preserved, the court granted temporary relief. This serves to underscore the role that the judiciary plays in promoting successful arbitration processes. It was stated by the Supreme Court that the award-debtor cannot be subjected to a penal rate of interest, either during the period when he is entitled to exercise the statutory right to challenge the award, before a court of law, or afterward. The guidelines for determining the interest payable under section 31(7) (b) of the Act were established by the Supreme Court. In this case, the arbitrator possesses an inherent power to award interest *pendente lite*, unless the agreement expressly prohibits him from doing so. Furthermore, if a party does not raise such a plea before a tribunal, the party will be subject to the principle of waiver, which will prevent them from raising such a plea at a later stage. The Act provides the tribunal with a significant amount of discretion in the awarding of interest; hence, the court would not be justified in decreasing the rate of interest given by the tribunal unless there are particular grounds supporting the decrease in rate of interest. It is not sufficient to simply leave the interest column blank in order to satisfy the requirement of Section 31(7) (a) 1 of the Act; rather, there must be an explicit exclusion language in the agreement that precludes the award of interest.

Recommendations for Enhancing the Role of Indian Courts

- Legislative reforms aimed at further reducing judicial intervention and simplifying enforcement procedures can enhance the arbitration framework in India. Periodic reviews and amendments to the Arbitration and Conciliation Act, 1996, in line with international best practices, can ensure its relevance and effectiveness.
- Establishing specialized arbitration benches in higher courts can enhance the efficiency and predictability of judicial intervention in arbitration matters. Judges on these benches should be trained in arbitration law and practices.
- Strengthening existing arbitration institutions and establishing new ones can promote institutional arbitration. Providing financial and infrastructural support to arbitration centers and encouraging parties to opt for institutional arbitration can
- Conducting regular training programs and workshops for judges on arbitration law and practices can foster arbitration-friendly judicial attitudes. Collaborations international arbitration institutions can enhance expertise and knowledge sharing.
- Streamlining judicial processes for the appointment of arbitrators and enforcement of awards is essential. Establishing clear guidelines and timelines for judicial intervention can reduce delays and ensure timely resolution of disputes.
- Investing in arbitration infrastructure, including establishing state-of-the-art arbitration centers across major cities, can provide the necessary support for conducting efficient arbitral proceedings. Incorporating technology in arbitration, such as virtual hearings and electronic submission of documents can further enhance efficiency and accessibility.

Conclusion

The role of Indian courts in facilitating International Commercial Arbitration is critical for the development of a robust and reliable arbitration framework in the country. While significant progress has been made in aligning India's arbitration regime with global standards, challenges such as processes judicial persist. intervention, inconsistency in judicial decisions, and delays in judicial By addressing these challenges and leveraging opportunities for enhancement, Indian courts can play a pivotal role in positioning India as a premier destination for international arbitration. This requires a concerted effort involving legislative reforms, judicial training, promoting institutional arbitration, strengthening arbitration infrastructure, and enhancing enforcement mechanisms. Drawing on global best practices and successful case studies, India can create a conducive environment for international arbitration, fostering confidence and trust among international businesses and investors.

²³ 2018 SCC On Line SC 1922. improve the efficiency and consistency of arbitral proceedings.